Capital Case
No. 17-1107

IN THE

Supreme Court of the United States

MIKE CARPENTER, INTERIM WARDEN, OKLAHOMA STATE PENITENTIARY,

Petitioner,

v.

PATRICK DWAYNE MURPHY,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF FOR *AMICUS CURIAE* MUSCOGEE (CREEK) NATION IN SUPPORT OF RESPONDENT

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INTEREST OF AMICUS CURIAE

The Muscogee (Creek) Nation ("Nation" or "Creek Nation") is the fourth most populous Indian nation in the United States.[1] Thousands of Creek citizens reside within the boundaries of the Reservation that has been the Creek homeland for nearly two centuries. Today, the Nation provides significant governmental services to its citizens and noncitizens throughout the Reservation.

The Nation had no involvement in the genesis of this litigation but now finds its Reservation under direct attack. Petitioner claims that the Nation never enjoyed a Reservation in the Indian Territory, and that, even if it did, some indeterminate combination of allotment and statehood abolished it – all despite clear treaty and statutory text to the contrary. Moreover, Petitioner suggests that continued recognition of the Reservation will render Oklahoma a second-class state.

These litigation claims turn text and history on their heads and ignore the reality of daily, on-the-ground cooperation between the Nation and neighboring governments. As it did in the Tenth Circuit, the Nation files this brief, and an accompanying motion for divided argument time, in order to vindicate its core sovereign interests in the survival of its treaty-guaranteed Reservation.

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[1] No counsel for any party authored this brief in whole or in part. No one other than amicus curiae made a monetary contribution to fund the preparation or submission of this brief. The parties have consented to its filing.

INTRODUCTION AND SUMMARY OF ARGUMENT

Although *Nebraska v. Parker*, 136 S. Ct. 1072 (2016), unanimously distilled core principles of statutory construction and federal Indian law as they pertain to reservation diminishment, it is at best a bit player in Petitioner's briefing. In the face of *Parker's* edict that, "[a]s with any other question of statutory interpretation," legislative text is "the most probative evidence" of congressional intent to alter reservation boundaries, *id.* at 1079 (internal quotation marks omitted), Petitioner conjures a narrative featuring an inexorable march toward the destruction of the Nation's Reservation at statehood. That narrative is admittedly well-crafted. But it fails to grapple with critical text that – at each significant juncture – squarely contradicts it. As such, Petitioner's reimagined history devolves into a work of fiction.

Instead of text, Petitioner relies on inference. Because Congress curtailed various Nation powers, the story goes, it must have eliminated the Nation's governmental authority, and with it the Nation's Reservation, entirely. But just as this Court has elsewhere required a clear statement of congressional intent to dispossess core sovereign prerogatives, *see, e.g.*, *Bond v. United States*, 134 S. Ct. 2077, 2088-89 (2014), it is "an enduring principle of Indian law ... [that] courts will not lightly assume that Congress in fact intends to undermine Indian self-government," *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2031-32 (2014). In *Bay Mills*, this Court accordingly declined to infer from Congress's abrogation of certain tribal powers the

intent to abrogate others. "This Court has no roving license, in even ordinary cases of statutory interpretation, to disregard clear language simply on the view that ... Congress must have intended something broader. And still less do we have that warrant when the consequence would be to expand an abrogation of [tribal power]." *Id.* at 2034 (internal quotation marks and citation omitted).

Here, the case against inference is even stronger. Congress used express language to eliminate certain Nation powers. It had such language at its disposal to disestablish the Nation's Reservation, but chose not to use it, and instead twice reaffirmed the Nation's territorial jurisdiction. That should be the end of the matter.

Petitioner seeks to avoid this conclusion by resorting to the work of popular historians, and that reliance is telling. One of his key sources contrasts the "masterful personalities" of white Oklahomans with the "weaker characters" of the Indians, whose "barbarism" and "ignorance" afflicted the Indian Territory until "the superior race rushed in to occupy and assimilate and create a state that is magnificent in its wealth and activities." Luther B. Hill, *A History of the State of Oklahoma* 3-4 (1910).[2] Petitioner's resort to a work of such rank hagiography and bias should tell this Court all it needs to know about the "mountain of historical scholarship," Br. 26, on which Petitioner's narrative rests. *See also, e.g.*, Roy Gittinger, *The Formation of the State of Oklahoma* 257 (1939) (cited repeatedly and stating that "Oklahoma has more Indian citizens than any other

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[2] *Available at* http://bit.ly/MCN-Hill-History.

state ... [and] many negroes, with the resulting negro problem"). Petitioner's "mountain" is nothing more than an infested molehill.

This brief focuses on three critical periods in the Nation's history – reservation creation, allotment, and statehood – and demonstrates how, for each period, treaty and statutory text defeat Petitioner's claims. It then discusses the Nation's present-day provision of governmental services that benefit Nation citizens and noncitizens, as well as the congressional and judicial restrictions on the Nation's authority to regulate non-Indians on Reservation fee lands. Affirmance of the thorough, text-based decision below will result in none of the deleterious consequences advanced by Petitioner and his amici, but instead will allow the Nation to continue its vital role in bettering the quality of life throughout the Reservation.

ARGUMENT

I. THE CREEK NATION'S TREATY-PROTECTED RESERVATION HAS NEVER BEEN DISESTABLISHED.

A. The United States and the Creek Nation Established a Reservation by Treaty.

Petitioner first argues that the Nation's lands were never a "reservation" because the Nation held them under a fee patent. Br. 23-25. With this, Petitioner seeks to escape the "governing principle" that "[o]nce a block of land is set aside for an Indian reservation *and no matter what happens to the title of individual plots within the area*, the entire block retains its reservation status until Congress explicitly indicates otherwise." *Solem v. Bartlett*, 465

U.S. 463, 470 (1984) (emphasis added) (citing *United States v. Celestine*, 215 U.S. 278, 285 (1909)). Indeed, he seeks to raze this pillar entirely, claiming that he need only overcome "any presumption that Congress preserved the Creek land patents," Br. 32, rather than "[t]he presumption that Congress did not intend to diminish the reservation," *Solem*, 465 U.S. at 481.

Petitioner had good reason for not raising this argument below.[3] "'[R]eservation' .... is used in the land law to describe any body of land ... reserved from sale for any purpose. It may be a military reservation, or an Indian reservation[.]" *Celestine*, 215 U.S. at 285. Reservations, then, are not restricted to those lands where, in Petitioner's *ipse dixit*, Indians have only a right of occupancy, but rather include any blocks reserved from sale or other disposition for purposes within Congress's authority. The Creek Reservation unquestionably meets this definition.

Pursuant to the Indian Removal Act of 1830, §§ 1, 3, 4 Stat. 411, 412, the Treaty of 1832 "solemnly guarantied" lands "west of the Mississippi" to the Nation. Treaty with the Creeks, art. XIV, March 24, 1832, 7 Stat. 366, 368. The Treaty of 1833 then "establish[ed] boundary lines which will secure a ... permanent home to the whole Creek Nation," and did so in precise geographic terms. Treaty with the Creeks, Preamble, arts. II, VII, Feb. 14, 1833, 7 Stat. 417, 417-20. This is fatal to Petitioner's claims that the Nation's boundaries were "established" and "delineated" by land patents. Br. 24-25. And

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[3] *See, e.g.*, Okl. 10th Cir. Br. 75 n.25 ("the reservation was intact in 1900").

contrary to the United States' naked assertion, U.S. Br. 8, 24, these lands were in the public domain when reserved for the Creeks – they had been ceded to the United States in treaties with the Quapaw, 7 Stat. 176 (1818), and the Osage, 7 Stat. 183 (1818). *See Mo., Kan. & Tex. Ry. Co. v. United States*, 47 Ct. Cl. 59, 119 (1911) (Howry, J., concurring) ("these lands were reserved ... from the public lands"), *aff'd*, 235 U.S. 37 (1914). The 1833 Treaty thus ordained a reservation in the classic sense.[4]

Under the Removal Act, tribes could also receive a patent for their new lands "if they prefer it[.]" § 3, 4 Stat. 412. Accordingly, the 1833 Treaty authorized a patent, at the Nation's election, for the land "assigned ... by this treaty[.]" Art. III, 7 Stat. 419. The Creeks occupied their Reservation for years before a patent issued in 1852, which simply reproduced the 1833 boundaries verbatim. Fee Patent, Aug. 11, 1852, Land Title Plant, Muscogee Creek Nation, Book 1:748. *See Mo., Kan. & Tex. Ry.*, 47 Ct. Cl. at 119 (Howry, J., concurring) ("The patents rested on treaties[.]").

In the Treaty with Creeks and Seminoles, Aug. 7, 1856, 11 Stat. 699, the Nation made a small cession of land, with the modified boundaries described by reference to both the Treaties of 1832 and 1833 and the patent. Arts. I, III, 11 Stat. 699-700. The Nation then ceded the western half of its Reservation in the Treaty of 1866, which does not reference the patent

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[4] The United States previously urged this Court that the 1833 Treaty established a "reservation" for the Creeks. Brief for United States as Amicus Curiae at 11, *Okla. Tax Comm'n v. Muscogee (Creek) Nation*, No. 87-1068 (1987).

at all. Treaty with the Creek Indians, art. III, June 14, 1866, 14 Stat. 785, 786. The eastern half remained reserved from sale and "forever set apart as a home for said Creek Nation," with a guarantee of "quiet possession." Arts. I, III, 14 Stat. 786. These again are the hallmarks of a "legally constituted Indian reservation." *United States v. Dion*, 476 U.S. 734, 737 (1986); *Celestine*, 215 U.S. at 285.

Indeed, the Treaty of 1866 refers to the retained portion as the "reduced Creek reservation." Art. IX, 14 Stat. 788. That was no slip of the pen. The 1866 Cherokee treaty twice refers to lands bounded by "the Creek reservation." Treaty with the Cherokee Indians, art. IV, July 19, 1866, 14 Stat. 799, 800. In 1873, Congress sought a cession from the Creeks "of a Portion of their Reservation." Act of March 3, 1873, ch. 322, 17 Stat. 626 (referring to "limits of the Creek reservation" and distinguishing "Creek ceded lands from the Creek reservation"). Petitioner points to the word "reservation" when used to describe other tribes' lands as probative of congressional intent, *see* Br. 23-24 n.6, but dismisses these repeated references to the Creek "reservation" as "meaningless when all vestiges of reservation status were destroyed upon statehood," *id.* at 33. This is circular reasoning in the extreme.

Petitioner's argument contradicts not only text but logic. "[I]t would be anomalous" to hold that "title *stronger* than the right of occupancy" would leave Creek lands "with *less* protection." *Indian Country, U.S.A., Inc. v. Oklahoma*, 829 F.2d 967, 975-76 (10th Cir. 1987). It also ignores history, including President Jackson's defiance of Chief Justice Marshall's decision in *Worcester v. Georgia*, 31 U.S.

515 (1832), leading to the Nation's loss of its eastern lands and its forced removal west. *See* Resp. Br. 6. It is not surprising that the Nation thereafter opted for a patent as an *additional* layer of protection.

Petitioner now seeks to wield this election as a sword against the Nation. Br. 25. He would have the Nation's Reservation status turn on changes in title (on a "parcel by parcel" basis, no less, *id.* at 27). This Court has repeatedly rejected such an approach, *Solem*, 465 U.S. at 470; *Celestine*, 215 U.S. at 285, and should do so again here.

B. Congress Allotted the Creek Reservation to Fulfill the Treaty Purposes.

Changing conditions eventually caused Congress to consider allotment and cession of Creek lands. *Woodward v. De Graffenried*, 238 U.S. 284, 294-95 (1915). In Petitioner's telling, Congress created the Dawes Commission "with the singular purpose of breaking apart the Five Tribes" to enable statehood. Br. 26. But the 1893 statute creating the Commission simply directed it to negotiate with the Five Tribes

> to procure, first, such allotment of lands in severalty ... and, secondly, to procure the cession, for such price ... of any lands not found necessary to be so allotted ... to the United States .... But said commissioners shall, however, have power to negotiate any and all such agreements ... to enable the ultimate creation of a Territory of the United States with a view of the admission of the same as a state in the Union.

Act of March 3, 1893, ch. 209, § 16, 27 Stat. 612, 646.

Nothing here or elsewhere in the statute remotely suggests that Congress viewed eradicating the reservations as essential to statehood. In the Commission debate, Senator Perkins (an ardent statehood proponent) observed that "these reservations" have been "guaranteed to them by treaty stipulations" and saw no reason "why the ... treaties ... might not be respected and protected" consistent with statehood. 24 Cong. Rec. 259, 268 (1892).

From the outset, the Creeks "would not ... agree to cede any portion of their lands to the Government," so the Commission "abandoned all idea of purchasing any of it" and instead proposed "an equal division of all their lands" through allotment. S. Misc. Doc. No. 53-24 ("Dawes Rep."), at 7 (1894). While Petitioner's historian identifies "the ignorance ... of the Indian race" as a key obstacle faced by the Commission, Hill at 328, the Commission's account portrays the Creeks as astute negotiators determined to retain control of their lands, Dawes Rep. at 2, 7.

Congress agreed to the allotment proposal, and did so to preserve, not terminate, the treaty promises. In *Woodward*, this Court undertook the most comprehensive consideration of the legislative history of Indian Territory allotment by any federal court before or since to determine "the situation" Congress sought to "'remedy'" through allotment. 238 U.S. at 293. In short, land monopolies had emerged on the reservations, by which "[a] few enterprising [tribal] citizens" had gained control "of the best and greatest part of these lands[.]" *Id.* at 299

n.1 (internal quotation marks omitted). This violated "the principle of the treaties," which guaranteed the reservations "for the equal benefit of the citizens," *id.* at 297, and it was this principle that allotment sought to honor.

Nowhere in its extensive examination of Congress's intent did this Court suggest that allotment was aimed at abrogating the treaties as a prerequisite to statehood. To the contrary, the "manifest purpose" of allotment was "to administer the use of lands ... *according to the true intent and meaning of the early treaties*[.]" *Id.* at 306 (emphasis added).

C. The Creek Allotment Act Expressly Preserved the Nation's Legislative Authority over Its Reservation.

The Creek Nation agreed to the Allotment Act of March 1, 1901, ch. 676, 31 Stat. 861. By then, as Petitioner stresses, Congress had imposed significant restrictions on the Nation's government, including abolishing its courts. Act of June 28, 1898, ch. 517, § 28, 30 Stat. 495, 504-05. However, the Allotment Act expressly preserved the Nation's legislative jurisdiction over its Reservation, as this Court and the Eighth Circuit soon confirmed.

Consistent with the congressional objectives canvassed in *Woodward*, the Act provided for allotment "among the citizens of the tribe ... so as to give each an equal share of the whole in value." § 3, 31 Stat. 862. Lands were reserved for tribal purposes including schools, cemeteries, and churches. § 24, 31 Stat. 868-69.

Notably, lands were also reserved for townsites, § 24(a), 31 Stat. 868, where thousands of non-Indians had built improvements on lands they did not own. *Johnson v. Riddle*, 240 U.S. 467, 476-77 (1916). "All towns in the Creek Nation" of 200 or more residents were to be platted to facilitate their "growth." § 10, 31 Stat. 864. Lots could be purchased in fee by noncitizens with proceeds going to the Nation. §§ 11-14, 23, 31, 31 Stat. 866, 868, 870. These "*surplus lands* were disposed of with a view to continuing existing Indian towns and encouraging their enlargement." *Mo., Kan. & Tex. Ry.*, 47 Ct. Cl. at 82 (emphasis added).

Indian towns on the Reservation included Tulsa, founded by the Creeks in 1836 and named in memory of the centuries-old settlement set ablaze by non-Indians as the Creeks were removed from Alabama – its embers carried on the Trail of Tears and planted below a great oak that still stands in the city today. Angie Debo, *TULSA: from Creek Town to Oil Capital* 3, 8-15 (1943). "Tulsa was platted ... as a townsite on lands of the Creek Nation under the provisions of the [1901 Act]," *Tulsa v. Sw. Bell Tel. Co.*, 75 F.2d 343, 347 (10th Cir. 1935), with the first deeds issued in 1902, H.R. Rep. No. 57-5, at 187, 193, 226 (1902) – the year "valuable oil deposits" were discovered there, *id.* at 180. Such townsite provisions were a common means of allowing non-Indians to settle "within an Indian reservation." *Seymour v. Superintendent of Wash. State Penitentiary*, 368 U.S. 351, 358-59 (1962).

While making these significant adjustments to land ownership, Congress preserved the Nation's

legislative jurisdiction over the entire Reservation. Section 42 provided:

> No act, ordinance, or resolution of the ... Creek Nation in any manner affecting the lands of the tribe, or of individuals after allotment, or the moneys or other property of the tribe, or of the citizens thereof ... shall be of any validity until approved by the President of the United States.... [I]f approved ... it shall be published in at least two newspapers having a bona fide circulation in the Creek Nation.

§ 42, 31 Stat. 872. This textual acknowledgement of the Nation's continuing authority over the lands both "of the tribe" and "of individuals after allotment" is irreconcilable with Petitioner's claim that "[o]nce Congress allotted the land," the reservation "disappeared[.]" Br. 27. The requirement that notice of new laws be published "in the Creek Nation" underscores that conclusion.

Petitioner nowhere even *acknowledges* section 42. The United States acknowledges but has no answer for it, noting only that it "substantially diminished" the Nation's authority by subjecting its laws to federal oversight. U.S. Br. 13. But such oversight is a staple of federal-tribal relations. *See, e.g., United States v. Wheeler*, 435 U.S. 313, 327 (1978); 25 U.S.C. § 5123(a).

Thus, while Petitioner contends that allotment "evaporated" the Reservation, Br. 27, the Allotment Act contains no text to that effect and clear text to the contrary. Congress had previously applied termination language to other Creek lands. *See*

Resp. Br. 7. It did so in contemporaneous allotment statutes as well. *See, e.g.*, Act of April 21, 1904, ch. 1402, § 8, 33 Stat. 189, 217-18 (allotting Ponca and Otoe reservations in Oklahoma Territory, and providing "*further*, That the reservation lines of the said ... reservations ... are hereby, abolished"). *See Mattz v. Arnett*, 412 U.S. 481, 504 n.22 (1973) (citing Ponca/Otoe provision for proposition that "Congress has used clear language of express termination when that result is desired"). Petitioner's conclusory rhetoric cannot obscure the careful textual distinctions thus drawn by Congress in its treatment of different reservations.

Nor did Congress's divestment of the Nation's *adjudicative* jurisdiction undermine section 42's preservation of its *legislative* jurisdiction. "[L]egislative jurisdiction .... is quite a separate matter from jurisdiction to adjudicate." *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 813 (1993) (Scalia, J., dissenting) (internal quotation marks and citations omitted); *Nevada v. Hicks*, 533 U.S. 353, 357-58 (2001) (discussing distinction). Indeed, Congress enacted section 42 while acknowledging *in the same statute* that it had already abolished the Nation's courts. § 47, 31 Stat. 873.

In *Morris v. Hitchcock*, 194 U.S. 384 (1904), the Chickasaw Nation, under a provision materially identical to section 42, had enacted legislation regulating noncitizen activities within its reservation that the Secretary was enforcing. *See id.* at 391 & n.1. The *Hitchcock* plaintiffs challenged the Chickasaw's jurisdiction, arguing, as does Petitioner, that "whatever powers the Indian governments formerly had," they have "little of sovereign character

to them," including "no judicial system[.]" *Morris v. Hitchcock*, 21 App. D.C. 565, 576 (D.C. Ct. App. 1903) (reproducing arguments).

The Circuit rejected the challenge and this Court affirmed, stating that Congress intended "to permit the continued exercise, by the legislative body of the tribe, of such a power as is here complained of[.]" 194 U.S. at 393. In doing so, this Court recognized that tribal jurisdiction continued even where a noncitizen "was the absolute owner of the land[.]" *Id.* at 392 (discussing 23 Op. Att'y Gen. 528, 530 (1901)).

The following year, in *Buster v. Wright*, 135 F. 947 (8th Cir. 1905), the Eighth Circuit applied *Hitchcock* to the Creek Nation, which had likewise enacted legislation imposing conditions on noncitizen townsite owners "for the privilege ... of trading within its borders.... Repeated decisions of the courts, numerous opinions of the Attorneys General, and the practice of years place[d] beyond debate" the Nation's authority to enact such legislation. *Id.* at 949 (citing *Hitchcock*, 194 U.S. at 392). That authority "remained in full force and effect after ... the agreement of 1901" and was not diminished by "the establishment of town sites nor the purchase ... by noncitizens of lots therein[.]" *Id.* at 953-54.

These conclusions followed because, while Congress had significantly curtailed the Nation's powers, "every original attribute of the government of the Creek Nation still exists intact which has not been destroyed or limited by act of Congress[.]" *Id.* at 950. This Court continues to hew to this fundamental principle today. *See Puerto Rico v. Sánchez Valle*, 136 S. Ct. 1863, 1872 (2016) ("unless

... Congress withdraws a tribal power," a tribe "retains that authority in its earliest form"); *Bay Mills*, 134 S. Ct. at 2030.[5]

Buster and *Hitchcock* evidence a widespread contemporaneous understanding – including on the part of the judiciary, the President (who had approved the laws), the Secretary, and the Attorney General – that the Creek Allotment Act means what it says: the Nation's legislative authority over the Reservation continued "after allotment." These cases were the backdrop against which Congress enacted legislation in 1906 continuing that authority indefinitely.

D. Congress Deliberately Preserved the Creek Nation and Its Reservation.

The Creek Allotment Act provided for the dissolution of the Creek government by March 4, 1906, subject to "further legislation[.]" § 46, 31 Stat. 872. After first extending "the tribal government" through a Joint Resolution, S.J. Res. 37, 59th Cong., 34 Stat. 822 (1906), Congress enacted the Five Tribes Act ("FTA"), section 28 of which provided:

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[5] *Buster* cannot today be cited for the proposition that tribal jurisdiction over nonmembers is absolute, as this Court has since recognized limitations on that jurisdiction. *See, e.g., Montana v. United States*, 450 U.S. 544 (1981). But *Buster* continues to be cited by this Court, which has never questioned *Buster*'s holding that the Allotment Act sustained the Nation's legislative jurisdiction over non-member activities within its Reservation. *See, e.g., Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 332-33 (2008) (noting that *Buster* upheld Creek Nation's power to tax "nonmembers for the privilege of doing business within the reservation").

> That the tribal existence and present tribal governments of the [Five Tribes] are hereby continued *in full force and effect for all purposes authorized by law*, until otherwise provided by law...: *Provided*, That no act, ordinance, or resolution ... of the ... legislature of any of said tribes ... shall be of any validity until approved by the President[.]

Act of April 26, 1906, ch. 1876, § 28, 34 Stat. 137, 148 (first emphasis added).

Petitioner argues that Congress preserved the Creek government "due to practical administrative concerns," principally the need to continue executing deeds. Br. 19. But this again ignores Congress's words – maintaining governmental authority "in full force and effect for all purposes authorized by law" would have been overkill, to say the least, if the execution of deeds had been Congress's sole end. *See Tiger v. W. Inv. Co.*, 221 U.S. 286, 303 (1911) (referring to the "right of legislation" preserved by section 28). And while Petitioner notes that the Act further curtailed the Nation's powers, including its taxing authority, Br. 13, the territorial jurisdiction preserved by section 42 of the Allotment Act and vindicated in *Hitchcock* and *Buster* extended beyond taxation. Even absent section 28's affirmative declaration of continuing authority, Congress's decision to eliminate one aspect of that jurisdiction would provide "no roving license" to find it abolished altogether. *Bay Mills*, 134 S. Ct. at 2034.

Indeed, if one is to go beyond text, the legislative history of section 28 confirms that Congress acted

specifically to preserve the Reservation. By treaty, the Creek held the Reservation "so long as they shall exist as a nation, and continue to occupy the country hereby assigned," art. III, 7 Stat. 419, with the "reversionary interest" in the United States, Pet. App. 84a n.49. Congress carefully considered this circumstance in early 1906 because of its implications for massive railroad grants in the Indian Territory. In 1866, Congress had conditionally granted to two railroads millions of acres in the Creek and other Five Tribes' reservations. *See Mo., Kan. & Tex. Ry.*, 47 Ct. Cl. at 85-89 (Howry, J., concurring). The grants would take effect "whenever the Indian title shall be extinguished," and "said lands become a part of the public lands of the United States." Act of July 25, 1866, ch. 241, § 9, 14 Stat. 236, 238; Act of July 26, 1866, ch. 270, § 9, 14 Stat. 289, 291.

The grants, in other words, would take effect *upon disestablishment*. *See Parker*, 136 S. Ct. at 1079 (disestablishment occurs by "extinguish[ing] the land's prior use ... as an Indian reservation – and ... return[ing] it to the United States"). Congress, which was on notice that the railroads viewed both allotted and unallotted lands as falling within the grants, 40 Cong. Rec. 3189, 3222 (1906) (Rep. Curtis), focused squarely on this point in its deliberations over section 28, and continued the Creek government with the specific intent to avoid that result:

> This land ... has been granted by the Government ... to those tribes ... so long as the Indians exist as a tribe.... Any Senator can see that the moment the tribal relation terminates the tribal interest in the property ceases, and it must necessarily revert to ...

> the United States.... The railway grant contains a provision that it should take effect on condition that the land became public land of the United States.

40 Cong. Rec. 2959, 2976 (1906) (Sen. McCumber); *see also, e.g.*, 40 Cong. Rec. 3034, 3053 (1906) (Sen. Aldrich); *id.* at 3064 (Sen. McCumber).

Congress understood that the rights at issue existed "by virtue of treaties," *id.* at 3054 (Sen. Culberson), that "[i]t is the sovereignty that holds this title," 40 Cong. Rec. at 2975 (Sen. Teller), and that the land "was granted to the tribe only so long as it occupied it as a tribe," 40 Cong. Rec. at 3055 (Sen. McCumber). Section 28 was hence necessary to preserve the "lapse of title which would result in the lands becoming public lands[.]" 40 Cong. Rec. at 2977 (Sen. Heyburn). *See also* 40 Cong. Rec. at 3061 (Sen. Teller) ("[T]he wisest thing for us to do would be to extend [the tribal governments] indefinitely.").

Congress fully understood, furthermore, that in averting disestablishment, it was averting the transfer of lands to state jurisdiction:

> I hope we ... [can] get the bill [with section 28] through, so that we may protect the Indians ... because ... the moment the tribe ceases to exist as a tribe ... we have no further control over the property of those Indians. *They will then be controlled by the new State.*

40 Cong. Rec. at 2977 (Sen. McCumber) (emphasis added). The Senators in fact deliberately suspended action on the pending statehood bill to first ensure that the lands would "be safeguarded for all time to

the Indians and their descendants.... It is vastly more important that *the statehood bill should wait* ... than that this bill should be in the slightest degree jeoparded." 40 Cong. Rec. at 3052 (Sen. Spooner) (emphasis added).

This Court has unanimously held that for Congress to abrogate a treaty right, "[w]hat is essential is clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty." *Dion*, 476 U.S. at 739-40. Here, the opposite occurred. Congress carefully considered a potential conflict with Creek treaty rights and decided *not* to eliminate them.

While Petitioner highlights sovereign Creek rights that Congress explicitly withdrew, when it comes to the Creek Reservation Petitioner can only rely on inference, because Congress in fact decided against disestablishment. "It is not doubted that the United States had power to trample upon its treaty obligations and make the lands of the civilized tribes a part of the public domain ... but there was ... a complete settlement of the question by the action of Congress in continuing the use of these lands according to the spirit of the treaties." *Mo., Kan. & Tex. Ry.*, 47 Ct. Cl. at 116 (Howry, J., concurring), *aff'd*, 235 U.S. at 40 (Holmes., J.) (holding, in rejecting argument that allotted Creek lands fell within railroad grant, that "a mere change from tribal title was not enough" as the Creek lands had been "forever set apart as a home for the Nation" by treaty).

E. Statehood Did Not Affect the Creek Reservation Boundaries.

Petitioner asserts (quoting not Congress but a booster newspaper) that the "coming of statehood ... obliterate[d]" tribal boundaries. Br. 28. But nothing in the Oklahoma Enabling Act purports to terminate those boundaries. Congress instead – *in the first sentence of the statute* and consistent with its contemporaneous section 28 deliberations – forswore any intent

> to limit or impair the rights of person or property pertaining to the Indians of said Territories (so long as such rights shall remain unextinguished) or to limit or affect the authority of the ... United States to make any law or regulation respecting such Indians, their lands, property, or other rights ... which it would have been competent to make if this Act had never been passed.

Act of June 16, 1906, ch. 3335, § 1, 34 Stat. 267, 267-68. *See also* § 3, 34 Stat. 270 (Oklahoma required to "forever disclaim all right and title ... to all lands ... owned or held by any Indian, tribe, or nation").

A Congress bent on "obliterat[ing]" Indian reservations upon statehood would not have used such language (which again is entirely absent from Petitioner's account). Indeed, this Court had recently interpreted materially identical language in the Kansas enabling act to mean that "[t]he Indians continued thereafter as previously in possession of the lands, and their rights ... were not extinguished *by anything in the act of admission* of the State[.]" *Mo., Kan. & Tex. Ry. Co. v. Roberts*, 152 U.S. 114, 120

(1894) (emphasis added). And while Petitioner claims that *Coyle v. Smith*, 221 U.S. 559 (1911), renders Congress's intent to disestablish the reservations "pellucid," Br. 22, *Coyle* instead declares that provisions pertaining "to the control by the United States of large Indian reservations ... of the new State, are found in the Oklahoma enabling act." 221 U.S. at 570. In sum, "Congress was careful to preserve the authority of ... the United States over the Indians, their lands and property, which it had prior to the passage of the [Enabling] act." *Tiger*, 221 U.S. at 309.

And there is more. Within days of the Enabling Act, the same Congress passed the Act of June 21, 1906, ch. 3504, 34 Stat. 325. This statute sought to stem a boundary dispute by "declar[ing]" an 1871 survey line mandated by the Treaty of 1866 "to be *the west boundary line of the Creek Nation*," *id.* 364 (emphasis added), and established a judicial recording district with reference to "the north line of the Creek Nation," *id.* 343. Petitioner shrugs off this textual evidence of an extant Reservation by suggesting that the "boundaries remained relevant for purposes of allotment[.]" Br. 34. But that does not explain why Congress chose the words it did, while referencing other reservations as disestablished *in the same statute*. *See, e.g.*, 34 Stat. 379 (referring to an allotment "in what was formerly the north half of the Colville Indian Reservation"); *id.* 375 ("the former Uintah reservation"). Congress is not as careless with language as Petitioner would have it.

Bereft of a coherent textual argument, Petitioner draws on isolated statements of Pleasant Porter,

who, until his death in 1907, spoke for the "faction" of the Creek membership "resigned" to dissolution, *Harjo v. Kleppe*, 420 F. Supp. 1110, 1131 (D.D.C. 1976), *aff'd*, 581 F.2d 949 (D.C. Cir. 1978), which often put him at odds with the Creek National Council. With section 28, Congress proved Porter wrong, and his predictions regarding dissolution never came to pass. *See Bd. of County Comm'rs v. Seber*, 318 U.S. 705, 718 & n.23 (1943).

Petitioner also relies on the subsequent dispossession of Creek lands. But Respondent well describes the orgy of lawlessness responsible for that dispossession, Resp. Br. 13-15, and Petitioner misapprehends the role of this Court if he thinks that it sits to ratify such actions.

Finally, Petitioner again urges the Court to *infer* disestablishment from Congress's restrictions on tribal self-government, suggesting, for example, that Congress authorized the sale of tribal schools and other property, leaving them with "no schools, no buildings[.]" Br. 22, 28-29 (citing § 15, 34 Stat. 143 ("section 15")). This argument smacks of overreach. Section 15 authorized the Secretary to sell school and other properties only "at such time ... as he may prescribe[.]" 34 Stat. 143. Indeed, just weeks later, Congress authorized "the maintenance, strengthening, and enlarging of the tribal schools," 34 Stat. 340, and it continued to do so well after statehood, *see, e.g.*, Act of March 2, 1917, ch. 146, 39 Stat. 969, 985 (authorizing funding of "improvements" and "new buildings" for tribal schools).

More fundamentally, Congress included a provision in its first Indian appropriations act *after* statehood materially identical to section 15, except that it applied expressly to properties "on lands belonging to the Five Civilized Tribes[.]" Act of April 30, 1908, ch. 153, 35 Stat. 70, 71. Congress's deliberations over that phrase again contravene Petitioner's argument.

Senator Owen of Oklahoma had proposed to amend the phrase to refer to "lands *heretofore* belonging to the *late* Five Civilized tribes." 42 Cong. Rec. 2576, 2584 (1908) (emphasis added). After statehood, he asserted, "the lands embraced in eastern Oklahoma, which formerly might have been called 'reservations' are not reservations," *id.*, and "the word 'late'" is used where a tribe "has lost governmental functions," *id.* at 2592. In support of these claims, Senator Owen advanced the very arguments reprised by Petitioner here. *See id.* at 2591-93, 2595-96.

The response was led by Senator Curtis, principal author of the Curtis Act. Congress had "extend[ed]" the tribal governments in 1906, such that "the Five Civilized Tribes are in existence *as much to-day as they ever were*, except the acts of their legislature must be approved by the President." *Id.* at 2586 (emphasis added). When Senator Owen protested, as Petitioner does, that the tribes were "absorbed by Oklahoma absolutely," Senator Curtis countered that "*[t]he lands have not been absorbed.*" *Id.* (emphasis added). His colleagues agreed, *see, e.g.*, *id.* at 2595 (Sen. McCumber) (federal guardianship continues "[f]or the property which has been granted

them and the protection of that property, yes; absolutely"), and the amendment was defeated.[6]

During the debate over Senator Owen's proposed amendment, it became clear that he was making his arguments with a willing disregard for statutory text:

> Mr. CURTIS. Why put in the word "late?"
>
> Mr. OWEN. Because they are dead.
>
> Mr. CURTIS. The law says they are not.
>
> Mr. OWEN. *The law is mistaken if it says so.*

Id. at 2584 (emphasis added). So too with Petitioner. Congress expressly considered and rejected the argument that the Five Tribes and their lands had evaporated upon statehood, if not before. It instead enacted *text* confirming what it had already made clear in the FTA and the Enabling Act. 35 Stat. at 71. Petitioner returns now, a century later, urging this Court to reach back into that debate and upend it, to accept arguments Congress rejected, and to reject those it accepted as evidenced by the law itself. But while Petitioner may "wish that Congress would have spoken differently," this Court does not exist to "remake history." *Parker*, 136 S. Ct. at 1082 (internal quotation marks omitted); *see also Indian Country*,

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[6] Congress recognized the Nation's continuing authority again in 1909, when it made approval by "the Creek National Council" a "condition precedent" to the operation of federal legislation equalizing the value of Creek allotments throughout the Reservation. Act of March 3, 1909, ch. 263, 35 Stat. 781, 805.

U.S.A., 829 F.2d at 981 ("It is not for the courts to complete a task that Congress chose not to finish.").

II. THE CREEK NATION'S EXERCISE OF GOVERNMENTAL AUTHORITY ON ITS RESERVATION ENHANCES THE QUALITY OF LIFE FOR ALL OKLAHOMANS.

The Creek Nation, like many tribes, suffered significant insults to its authority during the allotment era. However, the "metes and bounds" of tribal sovereignty are Congress's to adjust, *United States v. Lara*, 541 U.S. 193, 202 (2004), and Congress returned in 1936, through the Oklahoma Indian Welfare Act, 25 U.S.C. § 502, to restore to the Nation "all powers associated with [tribal] self-government," including its courts, *Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439, 1445 (D.C. Cir. 1988).[7] The Nation has since flourished.

Lacking textual arguments, Petitioner and his amici resort to dire predictions regarding the consequences of an affirmance. But programs administered by Creek governmental agencies – in close cooperation with their State and local counterparts – enhance, rather than detract from, the quality of life for citizens and noncitizens throughout the Reservation. This Court's clear jurisdictional precedents guide this cooperation and guard against the doom portended in the top-side briefing.

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[7] Then-Circuit Judge Ruth Bader Ginsburg joined the *Hodel* opinion.

A. The Nation Provides Critical Services to Indians and Non-Indians Throughout the Reservation.

The Nation is the fourth most populous tribe in the country, with 86,100 citizens.[8] Its 1979 Constitution maintains the tripartite, separation-of-powers government first established in 1867, with a democratically elected Principal and Second Chief and National Council, and an independent judiciary nominated by the executive and confirmed by the legislature.[9] The Nation's government has an annual budget of more than $300 million and employs nearly 2,500 people.[10] It provides for the health, safety, and welfare of persons throughout the Reservation, including non-Indians, ensuring access to quality services that otherwise would not be available, particularly in rural areas. The Nation's economic development entities, ranging from gaming facilities to business support services to farms, employ an additional 2,522 people.[11]

The Nation's critical role in providing essential governmental services to Reservation communities is aptly illustrated by the following program areas: law enforcement, family violence, health care, and education.

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[8] http://bit.ly/creektourism; http://bit.ly/mcncitizenship.

[9] http://bit.ly/creektourism; http://bit.ly/mcnconstitution, arts. IV-VIII.

[10] https://bit.ly/2MjnNad; http://bit.ly/FY-2017-Employment (Government Employment).

[11] http://bit.ly/FY-2017-Employment (Business Employment); http://www.mnbe.com/; http://bit.ly/MCN-FY2018-3d-Qtr-Rpt, at 18.

Law Enforcement. The Nation's Lighthorse Police Department plays a pivotal role in coordinated law enforcement efforts on the Reservation. It has entered cross-deputization agreements with the United States, the State, and 32 county and municipal jurisdictions, including the City of Tulsa. It is also a member of the FBI Safe Trails Task Force and of violent crime and drug task forces involving multiple county and municipal agencies.[12]

The Department has patrol, investigation, narcotics, hostage, K-9, and lake patrol units. Pursuant to its inter-governmental agreements, it responds to approximately 5,000 criminal and emergency situations throughout the Reservation annually, regardless of the Indian status of those involved.[13] This cooperation has yielded notable success. For example, in recent months a Lighthorse hostage negotiator worked with county law enforcement to prevent a "suicide-by-cop,"[14] and a Lighthorse K-9 unit assisted in apprehending a non-Indian inmate who had escaped from a State facility.[15] And the Okmulgee District Attorney has declared that a complex drug investigation yielding multiple arrests "would not have been possible without the close cooperation and outstanding effort of all of the agencies involved.... Oklahoma Bureau

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[12] http://bit.ly/MCN-Lighthorse; http://bit.ly/drug-task-force; http://bit.ly/indian-county-crime.

[13] http://bit.ly/lighthorse-police; http://bit.ly/Lighthorse-Calls-for-Service; http://bit.ly/lighthorse-patrol.

[14] http://bit.ly/Lighthorse-Negotiation.

[15] http://bit.ly/inmate-capture.

of Narcotics was a major player as well as Creek Nation Lighthorse[.]"[16]

The Nation prosecutes offenders in accordance with the Tribal Law and Order Act of 2010, 25 U.S.C. § 1302(b)-(d), and the Violence Against Women Reauthorization Act of 2013, 25 U.S.C. § 1304, and accordingly affords defendants protections mirroring those of the federal Bill of Rights, including due process and equal protection, assistance of counsel, and in the case of non-Indian defendants, the right to a jury pool including non-Indian community members.[17] Appeals are taken to the Nation's seven-member Supreme Court, the decisions of which are published on the Court's website and in legal databases.[18]

Family Violence. Without regard to tribal citizenship, the Nation's Family Violence Prevention Program (FVPP) provides services throughout the Reservation to victims of domestic violence, sexual assault, and stalking.[19] These services include 24-hour emergency assistance and crisis intervention, Sexual Assault Nurse Examiners providing treatment and evidence collection, legal advocacy, and multi-jurisdictional program coordination.[20] Since 2016, FVPP has served 475 Indian and 306

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[16] http://bit.ly/okmulgee-roundup.

[17] NCA 10-210, *available at* http://bit.ly/csc-T14-NCA10-210; NCA 16-038 § 3-301, *available at* http://bit.ly/csc-NCA-16-038-part1.

[18] http://bit.ly/csc-justices; http://bit.ly/csc-law.

[19] http://bit.ly/family-violence-prevention.

[20] *Id.*; http://bit.ly/SANEProgram.

non-Indian clients, and in many areas of the Reservation is the only agency doing so.[21]

The United States Department of Justice recently accorded FVPP's director a National Crime Victim Service award, with Attorney General Sessions declaring that FVPP "has expanded access to specialized populations, including teens and children impacted by dating and sexual violence."[22] Local recognition is effusive and reflects the common understanding that the Nation's jurisdiction spans the Reservation. For example, an Okmulgee County Special District Judge declared this year that "[o]ur county, being rural in nature, is lacking in resources ... to ensure safety, justice, support and healing for adults impacted by sexual or domestic violence. Fortunately, I am able to consistently direct people to the Muscogee (Creek) Nation program for their invaluable resources[.]"[23] Likewise, the Muskogee County District Attorney's Office has recognized that FVPP ensures access to services "in rural communities *across the eleven counties that comprise the jurisdictional boundaries of the Muscogee (Creek) Nation*."[24]

Health Care. The Nation's healthcare system serves more than 30,000 Indian and non-Indian patients each quarter at its two rural hospitals,

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[21] http://bit.ly/MCN-FVPP-Clients; http://bit.ly/FVPP-Map.

[22] http://bit.ly/FVPP-award.

[23] http://bit.ly/Ramirez-Letter.

[24] http://bit.ly/Roberts-Letter (emphasis added); *see also* http://bit.ly/MCN-FVPP-Letters-of-Support (additional letters).

rehabilitation center, and six medical clinics.[25] The Nation's state-of-the-art hospitals, one of which was on the verge of closing before the Nation purchased and rehabilitated it, provide emergency room, laboratory, surgical, and inpatient and outpatient specialty care.[26] The Nation built this expansive system to meet the significant needs of underserved rural communities throughout the Reservation.[27]

The Nation's efforts again are widely recognized. In 2013, for example, University of Oklahoma President (and former Oklahoma Governor and United States Senator) David Boren praised the Nation's "'exceptional' job improving the quality of life for the people in the 11 counties it covers," noting that "'[t]he Creek Nation has brought health care to all the people in its boundaries.'"[28]

Education. The Nation makes vital contributions to education on the Reservation. Its Head Start program serves 286 children and its WIC program serves women and children at 12 clinic locations, all without regard to tribal citizenship.[29] Between 2013 and 2017, the Nation contributed more than $40 million to the State's public education

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[25] http://www.creekhealth.org ("Hospitals" and "Clinics"); http://bit.ly/MCN-FY2018-3d-Qtr-Rpt, at 5.

[26] http://bit.ly/CH-Hospital; http://bit.ly/CH-MedicalCenter; http://bit.ly/CreekNation-ER-Expansion.

[27] http://bit.ly/MCN-HospitalOpens; http://bit.ly/CreekNation-ER-Expansion.

[28] http://bit.ly/rehab-center-sale.

[29] http://bit.ly/MCN-Head-Start; http://www.mcn-nsn.gov/services/wic/.

fund.[30] The Nation's Department of Education, Employment, and Training partners with local school districts and the Oklahoma Department of Education to improve education outcomes for all students.[31]

These programs are important, but by no means exclusive, examples of the Nation's provision of critical governmental services throughout the Reservation. Far from rendering Oklahoma a "second-class State," Pet. for Cert. 34, the Nation enhances the quality of life for *all* Oklahomans.

B. Affirming the Boundaries of the Creek Reservation Will Not Disrupt the Balance of Civil Jurisdiction.

Ignoring all of this, Petitioner's amici paint tribal jurisdiction as a looming threat. This Court's precedents, however, are not "ambiguous," IMLA Br. 10, and will not permit "a tsunami of uncertainty and jurisdictional litigation," States Br. 20. The Nation's civil jurisdiction is narrowly circumscribed, and State and local governments will continue to regulate non-Indian citizens and businesses.

1. Tribal Civil Jurisdiction Is Highly Restricted.

As a result of the allotment era, significant numbers of non-Indians live on Indian reservations throughout the country. In *Montana v. United States*, 450 U.S. 544, 565 (1981), this Court set forth the basic presumption "that the inherent sovereign powers of an Indian tribe do not extend to

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[30] http://bit.ly/GameReport-2017, at 5.

[31] http://bit.ly/MCN-FY2018-3d-Qtr-Rpt, at 10-11.

[nonmember] activities" on reservation fee land, subject to two circumscribed exceptions.

These two exceptions are not "highly subjective." EFO Br. 9. The first applies to nonmembers in "consensual relationships with the tribe or its members" (such as contracts and leases), *Montana*, 450 U.S. at 565, that are based on their own affirmative, voluntary conduct. Thus, "a nonmember's actual or potential receipt of tribal police, fire, and medical services does not create the requisite connection." *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 655 (2001). Moreover, the exception requires a nexus between tribal regulation and the consensual activity – "it is not 'in for a penny, in for a Pound.'" *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 338 (2008) (quoting *Atkinson*, 532 U.S. at 656). And under the second exception, non-Indian conduct on fee land may be subject to tribal regulation only if it "imperil[s] the subsistence or welfare" of the tribe. *Id.* at 341 (internal quotation marks omitted) (brackets in original). The operation of a commercial enterprise, by itself, does not remotely satisfy this standard. *Atkinson*, 532 U.S. at 659.

Like other forms of civil jurisdiction, tribal taxing authority is controlled by *Montana*. "An Indian tribe's sovereign power to tax" presumptively "reaches no further than tribal land." *Id.* at 653. For amici's members engaged in commerce with non-Indians on fee land, there is thus virtually no risk of tribal taxation. While amici cite *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982), *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989), and *Kerr-McGee Corp. v. Navajo Tribe of Indians*, 471 U.S. 195

(1985), in claiming otherwise, *all* involved taxation of mineral development on *tribal trust lands*, which are unaffected by reservation status.

Tribal zoning is likewise subject to the general rule and hence not the threat amici conjure. While this Court upheld tribal zoning of a non-Indian fee parcel in *Brendale v. Confederated Tribes and Bands of Yakima Nation*, 492 U.S. 408, 444 (1989) (concurring opinion of Stevens, J.), that decision turned on the parcel's location "'in the heart' of over 800,000 acres of closed and largely uninhabited tribal land" and on the prospect that development of this pristine forestland "would place the entire area 'in jeopardy,'" *Atkinson*, 532 U.S. at 658 (quoting *Brendale*, 492 U.S. at 440, 443). Tellingly, in the 30 years since *Brendale*, no case involving tribal zoning of non-Indian lands has reached this Court.

Not only this Court's precedents, but also congressional action, have already addressed amici's concerns. Amicus Oklahoma Independent Petroleum Association (OIPA) suggests that oil and gas production on fee lands will be subject to tribal and federal authority. OIPA Br. 30. But the statutes it invokes, and their implementing regulations, only apply on *Indian trust and restricted fee lands* (regardless of reservation status). *See* 25 U.S.C. §§ 396a, 2102. Contrary to OIPA's claim, Br. 28, this is no different on reservations in Oklahoma than anywhere else.

Nor would affirmance supplant State regulatory authority under the Clean Air Act or the Safe Drinking Water Act. OIPA Br. 27-28, 30-31; EFO Br. 2. The "Inhofe rider" to the SAFETEA Act provides

Oklahoma with special protection in this regard – where Oklahoma is authorized to implement environmental regulations outside Indian Country, the EPA "Administrator shall approve the State to administer the State program ... in Indian country[.]" § 10211(a), 119 Stat. 1144, 1937 (2005). This provision further precludes EPA from delegating environmental authority to the Nation *absent the State's agreement*. *Id.* § 10211(b).

It is not difficult, then, to summarize this Court's precedents: With "one minor exception" – *Brendale* – this Court has "never upheld under *Montana* the extension of tribal civil authority over nonmembers on non-Indian land." *Hicks*, 533 U.S. at 360. Amici are left to posit that the *mere existence* of tribal jurisdiction portends "confusion and conflict." States Br. 24. But if such conjecture were sufficient, Nebraska would have prevailed in *Parker*. Instead, that decision put such non-textual arguments to rest. 136 S. Ct. at 1082.

2. Reservation Status Does Not Impair the Jurisdiction or Operation of State and Local Governments.

Amici's turgid claims that "the functions of local governments could be greatly impaired, if not completely destroyed," IMLA Br. 4, by an affirmance are likewise divorced from reality. Not surprisingly, these claims are raised by inside-the-Beltway organizations possessing no apparent familiarity with the cooperation between the Creek Nation and local governments. *Id.* 1-2. Nor apparently with this Court's precedents.

Amici posit that "[i]t is unclear how, if at all, the state and local governments would collect taxes in 'Indian Country.'" *Id.* 11. But *all unrestricted fee lands* on the Reservation – regardless of Indian or non-Indian ownership – are subject to State and local property taxation. *See Cass County v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103, 111 (1998); *County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251, 267-68 (1992).[32] Therefore, the Tenth Circuit's decision will have no effect on property tax revenue collected within the boundaries of the Reservation.

State and local governments will also continue to tax nonmembers' commercial activities. This Court has upheld state taxes on non-Indians' on-reservation activities "unless expressly or impliedly prohibited by Congress," *Cotton Petroleum Corp.*, 490 U.S. at 173, and has *never held invalid* a state tax on non-Indian activities on fee lands. It has also upheld a broad range of state taxes on non-Indians *on tribal trust lands*, including oil and gas production taxes, *id.* at 163, and sales and cigarette taxes, *Washington v. Confederated Tribes of Colville Reservation*, 447

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[32] Reservation status likewise does not affect the taxability of Creek trust and restricted fee lands, and of oil and gas production from those lands, which is controlled by various federal statutes. *E.g.*, Act of June 26, 1936, ch. 831, § 1, 49 Stat. 1967 (lands taken into trust for Indians "within or without existing Indian reservations" in Oklahoma "shall be free from any and all taxes" except state tax "upon all oil and gas produced from such lands").

U.S. 134, 151 (1980).[33] Nor will affirmance oust local governments of their existing zoning jurisdiction. IMLA Br. 19, 22-23; *see Brendale*, 492 U.S. at 416, 432 (opinion of White, J.) (upholding county, and rejecting tribal, zoning of fee land in mixed-use area of reservation).

These precedents have enabled Oklahoma's Indian nations and the State and its political subdivisions to resolve jurisdictional conflicts as they arise and to coordinate the delivery of services statewide, as demonstrated by their 600-plus intergovernmental agreements (more than three dozen of which include the Nation).[34]

Intergovernmental cooperation also characterizes Petitioner's issue of concern. He notes that Congress has provided through the Indian Child Welfare Act for tribal jurisdiction over Indian children residing on the Reservation. Br. 56. The Creek Nation's Children and Family Services Administration provides comprehensive services, including guardianship, foster care placement, and reunification, and works in coordination with the Oklahoma Department of Human Services to protect and provide for the best interests of Indian children

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[33] While state jurisdiction may be preempted under the *Bracker* balancing test, *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144-45 (1980), state and local government interests play a prominent role in that balancing, and to date this Court has invalidated state taxes only in connection with activities on *tribal trust lands*. *See, e.g., New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 330-31 (1983); *Bracker*, 488 U.S. at 138-39, 145-48 & n.12.

[34] http://bit.ly/oksosgov; *supra* n.12.

within its jurisdiction.[35] The Nation's efforts, which further the policies of both Congress and the State, will continue irrespective of the outcome of this case. *See* 25 U.S.C. § 1902 (congressional declaration of policy); Okla. Stat. tit. 10, § 40.1 (recognizing that Indian nations "have a valid governmental interest in Indian children," and establishing State policy "to cooperate fully with Indian tribes in Oklahoma" to enforce "the intent and provisions of the federal Indian Child Welfare Act").

In sum, Reservation status does not divest State and local governments of their authority to tax, zone, or otherwise provide for the health and welfare of their residents. This is as true in metropolitan Tulsa as it is in rural Okemah. Amici's fee lands within the Creek Reservation are not unique: they are, "like millions of acres throughout the United States, non-Indian fee land within a tribal reservation." *Atkinson*, 532 U.S. at 648. Amici's broad-brushed claims are particularly misplaced given the critical governmental services that, as discussed above, the Nation provides throughout the Reservation. Indeed, far from destroying local government functions, from 2015 to 2018 the Nation contributed $29,993,435 to municipal, county, school, and tribal transportation construction and maintenance projects, and over $1.6 million to public schools, fire departments, and rural water systems.[36]

This Court's precedents expose amici's arguments for what they are – empty rhetoric. In

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[35] http://bit.ly/MCN-Child-Family-Services; http://bit.ly/Foster-Care-Agreement.

[36] http://bit.ly/TranaProjects; http://bit.ly/SpecialAppropriations.

Parker, Nebraska predicted that reservation status would bring "profound" "practical consequences," Neb. Br. 30, and "uncertainty and risk for the well-being of citizens of Nebraska," Neb. Cert. Pet. 25. In this case, while again warning that a "tsunami" of conflict will result, States Br. 20, amici including Nebraska fail to point to a single dispute arising in the wake of the *Parker* decision. Thankfully, state, local, and tribal governments do not govern their communities with rhetoric, just as this Court does not decide cases based on the same.

CONCLUSION

The Tenth Circuit's judgment should be affirmed.

Respectfully submitted,

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